BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 5948 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

DONALD L. BRYANT
(Claimant)

S.S.A. No.

BETHLEHEM PACIFIC
COAST STEEL CORP.
(Employer-Appellant)

PRECEDENT
BENEFIT DECISION
No. P-B-262

FORMERLY
BENEFIT DECISION
No. 5948

The above-named employer on March 25, 1952, appealed from the decision of a Referee (LA-48489) which held that the claimant was not subject to disqualification for benefits under Section 58(a)(1) of the Act /now section 1256 of the Unemployment Insurance Code/. On May 23, 1952, the Appeals Board remanded the case to a Referee for additional hearing. This hearing was held by a Referee in Los Angeles, California, on June 26, 1952, and the evidence adduced at this hearing is before this Appeals Board for consideration. All notices of hearings addressed to the claimant's most recent address of record with the Department have been returned by the post office undelivered. The claimant last contacted the Department in Riverside, California, on December 26, 1951.

Based on the record before us, our statement of fact, reason for decision and decision are as follows:

STATEMENT OF FACT

The claimant was last employed by the appellant for four days as a laborer at its Vernon plant at a wage of

$1.36 per hour. This employment terminated on Friday, November 16, 1951, when the claimant resigned under the circumstances hereinafter set forth.

On Monday, November 19, 1951, the claimant renewed his registration for work and filed an additional claim for benefits in the Riverside Office of the Department having previously established a benefits year on May 23, 1951. On December 26, 1951, the Department in response to a protest from the appellant-employer issued a determination holding that the claimant was not subject to disqualification under Section 58(a)(1) of the Act /now section 1256 of the code/ in that he had good cause for leaving his work. The employer appealed and a Referee affirmed the Department's determination.

According to the records of the employer, the claimant resided at 3515 Williams Street in Long Beach, California, at the residence of a cousin. During the claimant's employment, his cousin was ill and the claimant used his cousin's car for transportation to work. On November 16, 1952, the claimant informed his superintendent that he was unable to secure adequate transportation and that he was therefore terminating. The claimant and his superintendent discussed the possibilities of securing rides with other workers or using public transportation but the claimant considered these possibilities unsatisfactory due to the distance from his home to either public transportation or the residence of other workers. When interviewed by the Department representative on December 18, 1951, in the Riverside Office, the claimant stated that his address in Long Beach had been 2315 Williams Street and that his cousin had been ill during the period of his employment but on his recovery, he needed his car to drive to his own work on Terminal Island. At the hearing before the Referee on March 11, 1952, the employer estimated that the claimant resided between twelve and fifteen miles from the employer's establishment. No detailed information as to public transportation or private transportation was presented by the employer. At the hearing before the Referee on June 26, 1952, the employer was given an opportunity to present evidence as to possible transportation for the claimant. Evidence was introduced that there are three transportation lines from the Long Beach area to the Los Angeles area which connect with lines going to the employer's establishment, only two of which would probably be usable by the claimant and that two transfers would be necessary in order

to reach the employer's plant. The employer was also given an opportunity to submit transportation schedules subsequent to the hearing but merely submitted a general statement that service was available at fifteen to twenty minute intervals on one line and available at twenty-two to thirty minute intervals on the other two lines. There is no evidence in the record as to the travel time from point to point on any of the lines or the transfer delay. The claimant was employed on a rotating shift so that he changed shifts each week, and two out of every three weeks he would have required transportation either immediately before or immediately after twelve midnight.

REASON FOR DECISION

Section 58 of the Unemployment Insurance Act /now section 1256 of the code/ provides in part as follows:

> "(a) An individual shall be disqualified for benefits if:
>
> "(1) He has left his most recent work voluntarily without good cause, if so found by the commission; . . ."

In Benefit Decision No. 5008, we considered the possible disqualification of a claimant who resided approximately thirteen miles from her work and lived in the same metropolitan area as the claimant herein. In that case we said:

> "The claimant resides in a large metropolitan area where, as a matter of common knowledge, commuting a number of miles is the rule rather than the exception. Admittedly, the distance from her residence to Los Angeles was not, of itself, excessive. However, the distance to work is not the sole factor to be considered, the adequacy of transportation facilities, and the time consumed in daily travel to and from work being of greater importance. The record shows that a traveling time of approximately forty-five minutes on buses was required with another twenty-five minutes waiting to transfer. To be at her last work by 8:00 a.m., it was

necessary for the claimant to leave her residence at approximately 6:30 a.m., and, including the necessary walks involved in using the available transportation, she devoted three hours per day to commuting to and from her most recent employment. Considering all of the facts of this case, we conclude, as did the Referee, that as to this particular claimant she had good cause for voluntarily leaving her work and for refusing to accept an offer of re-employment in the same position. Therefore, she is not subject to disqualification for benefits under the provisions of Section 58(a)(1) or 58(a)(4) of the Act."

In the instant case, the claimant lived from twelve to fifteen miles from his place of employment and notified his employer that he was leaving because it was impossible to arrange satisfactory transportation. There is no evidence in the record as to the travel time necessary on public transportation, but the record does show that, on the lines which the claimant would have to use, service is not more frequent than every fifteen minutes and in some cases does not run oftener than every half hour and it would be necessary for the claimant to transfer twice.

In Benefit Decision No. 4466, we stated:

"We may presume, in the absence of evidence to the contrary, that the Department reached the conclusions expressed in its determination of January 29, 1946, only after investigation of the facts, and that the official duty of determining the eligibility of claimants for benefits, vested in the Department by Section 67 of the Act, was properly performed (Subdivision 15, Section 1963, C.C.P.). The evidence presented by the employer at the hearing before the Referee, in our opinion, was insufficient to overcome the findings of the Department."

In Benefit Decision No. 4827, we stated:

"In spite of the fact that there were two hearings held in this matter in which the issue was squarely presented, the employer saw fit to present no evidence that the position was not thus made vacant. The employer chose, however, to show only that a relatively few positions were made vacant by reason of the trade dispute. We concede that such evidence renders less probable that the position offered to the claimant was thus made vacant, but it certainly does not negate the possibility nor overcome the determination of the Department. In our opinion, the employer has not sustained the burden of proof that devolved upon the employer as appellant in this matter."

After considering all the available evidence, we conclude that the claimant left his work because of inadequate transportation. In accordance with our prior decision, we hold in the instant case he had good cause for leaving work within the meaning of Section 58(a)(1) of the Act /now section 1256 of the code/.

DECISION

The decision of the Referee is affirmed. Benefits are payable as provided in the decision of the Referee.

Sacramento, California, November 7, 1952.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MICHAEL B. KUNZ, Chairman

GLENN V. WALLS

EDWARD CAIN

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 5948 is hereby designated as Precedent Decision No. P-B-262.

Sacramento, California, March 9, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

RICHARD H. MARRIOTT

DISSENTING

CARL A. BRITSCHGI

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent.

This case seems to hold that the Department's determination, standing alone, will support a decision in accord therewith, even in the face of countervailing evidence produced by a party at the hearing. Notwithstanding the assertion that this decision is based on the record, we are handicapped by the lack of any transcript, exhibits, determination, or other evidence, all such records having been destroyed long ago. The recital of facts in the decision indicates that the employer was represented at the hearing, but the claimant was neither present nor represented. Although the decision is imprecise on this point, it does not appear that the Department was represented at the hearing.

In essence, the decision in this case gives more weight to the Department's determination standing alone than to the evidence presented by the employer. Such a result is based on the presumption that its official duty was regularly performed by the Department (then section 1963, subdivision 15, Code of Civil Procedure; now section 664 of the Evidence Code). In holding as they do, the majority overlook two significant changes in the law which have occurred since the decision in this case originally issued in 1952, one revision resulting from the enactment of the Evidence Code, the other being produced by a decision of the United States Supreme Court.

In 1952, all presumptions were "evidence" and were required to be considered by the trier-of-fact together with such other evidence as may have been adduced by testimony or exhibits. In 1965, the Evidence Code was enacted by the California Legislature to become effective January 1, 1967 (Ch. 299, Stats. 1965). Section 600 of the Evidence Code changed the nature of presumptions. Thereunder, a presumption is not itself evidence, but is an assumption as to the existence of a fact (called the presumed fact) that the law requires the trier-of-fact to make from another fact or group of facts (called the basic fact) which is found to exist.

A presumption today is not evidence; it is not testimony or a writing or a material object or anything presented to the senses, which an item must be to be evidence (Evidence Code, section 140). A presumption is simply a reasoning device that is used by the trier-of-fact in making a finding of fact from the evidence which is presented (California Evidence Benchbook, section 46.1). A presumption may be either conclusive or rebuttable, and if of the latter type, will affect either the burden of producing evidence or the burden of proof (Evidence Code, sections 601-603, 605).

Evidence Code section 664 sets forth the presumption that "official duty has been regularly performed." This is a rebuttable presumption and affects the burden of proof (Evidence Code, section 660). It may be attacked on either or both of two different bases: nonexistence of the basic fact; nonexistence of the presumed fact.

In California Department of Human Resources Development v. Java (1971), 402 U.S. 121, the United States Supreme Court had occasion to review the procedures used by the Department in making its determination whether a claimant is eligible or disqualified for benefits. In its published opinion, the court set forth in some detail the procedures used:

> "The interviewer has, according to the Local Office Manual (L.O.M.) used in California, the 'responsibility to seek from any source the facts required to make a prompt and proper determination of eligibility.' L.O.M. § 1400.3(2). 'Whenever information submitted is not clearly adequate to substantiate a decision, the Department has an obligation to seek the necessary information.' L.O.M. §1400.5(1)(a). This clearly contemplates inquiry to the latest employer, among others.
>
> "The claimant then appears for his interview. At the interview, the eligibility interviewer reviews available documents, makes certain that required forms have been completed, and clarifies or verifies any questionable statements. If there are

inconsistent facts or questions as to eligibility, the claimant is asked to explain and offer his version of facts. The interviewer is instructed to make telephone contact with other parties, including the latest employer, at the time of the interview, if possible. L.O.M. § 1401.4(20). Interested persons, including the employer, are allowed to confirm, contradict, explain, or present any relevant evidence. L.O.M. § 1401.4(21).

"The eligibility interviewer must then consider all the evidence and make a determination as to eligibility. Normally, the determination is made at the conclusion of the interview. L.O.M. § 1404.6(2). However, if necessary to obtain information by mail from any source, the determination may be placed in suspense for 10 days after the date of interview, or, if no response is received, no later than claimant's next report day. L.O.M. § 1400.3(2)(a).

"From the foregoing it can be seen that the interview for the determination of eligibility is the critical point in the California procedure. In the Department's own terms, it is 'the point at which any issue affecting the claimant's eligibility is decided and fulfills the Department's legal obligation to insure that . . . benefits <u>are paid promptly if a claimant is eligible</u>.' L.O.M. § 1400.1(1) (emphasis added). . . ." (footnote omitted)

* * *

"The primary inquiry at the preliminary interview is to examine the claimant's basic eligibility under the California statute. It is an occasion when the claims of both the employer and the employee can be heard, however. The regulations contemplate that the interviewer shall make inquiries of the employer informally. This may not always flush out objections based on discharge for

> cause, as this case illustrates. Nonetheless if the employer has notice of the time and place of the preliminary interview, as was the case here, it is his responsibility to present sufficient data to make clear his objections to the claim for benefits and put the interviewer in a position to broaden the inquiry if necessary. Any procedure or regulation that fails to give notice to the employer would, of course, be violative of the statutory scheme as we construe it."

At the conclusion of such interview, the Department interviewer is required to prepare a "Record of Claim Status Interview" (Form DE 2403) setting forth (usually in long-hand) the information obtained from the parties and stating the conclusion regarding eligibility of the claimant reached by the interviewer and the supervisor. The conclusion is then typed on a "Notice of Determination and/or Ruling" (Form DE 1080) which is mailed to the parties. It is this form which is referred to in the present case as "the Department's determination."

As is clearly stated by the Supreme Court, it is the interview that is the "critical point" in the Department's process of deciding whether benefits should be paid to any claimant. The "determination" is but a conclusionary notice memorializing the Department's decision. Seldom if ever does the "determination" recite or contain any of the evidence or contentions of the parties obtained by the Department during the interview. The facts and assertions upon which the "determination" is based are set forth on the "Record of Claim Status Interview," which shows the name of each person talked to by the interviewer and the information given by each such person.

I submit that under the current California Evidence Code, and in light of the peroration of the Supreme Court in the Java case, the basic fact that must be present to give rise to the presumption that "official duty has been regularly performed" is that an interview has been conducted in accordance with Java. The evidence of such interview is the "Record of Claim Status Interview," which not only supplies the basic fact required by the Evidence Code to give rise to the presumption, but generally is evidence itself within the

meaning of section 140 of said code, although generally hearsay. Absent this basic fact, the trier-of-fact (the Administrative Law Judge) is not required to apply the presumption set forth in section 664 of the Evidence Code, contrary to the rule stated in the instant case.

The essential item of evidence to sustain the Department's conclusion in a contested case is the "Record of Claim Status Interview" not the "determination." The latter is merely a notice of the Department's conclusion which, standing alone, is of no probative or dispositive value, whereas the "Record of Claim Status Interview" supplies the basic fact to bring the section 664 presumption into play and has the dual purpose of standing as evidence supportive of the Department's decision.

HARRY K. GRAFE